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No. — 387

In the Supreme Court of the United States

OCTOBER TERM, 1954

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

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No. —

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

C. W. VOLLMER & COMPANY, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above case on June 30, 1954.

OPINIONS BELOW

The opinion of the district court (App. 3a) is reported at 113 F. Supp. 235. The *per curiam* opinion of the Court of Appeals (App. 1a) is reported at 214 F. 2d 132.

JURISDICTION

The judgment of the Court of Appeals (App. 2a) was entered on June 30, 1954. On September 23, 1954, the time for petitioning for a writ of certiorari was extended by order of Mr. Justice Black to October 5, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

Respondent's employees have been engaged in construction work on the Algiers Lock and Canal, a project authorized by Congress under its power to regulate commerce. The project is designed as an improvement to, and an integral part of, the Gulf Intracoastal Waterway, an existing interstate waterway. It has been undertaken in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway."

The question presented is whether these employees are "engaged in commerce" within the meaning of the Fair Labor Standards Act, or whether work on such projects is excluded from the "commerce" coverage of this Act by reason of the "new construction" doctrine derived from early decisions under the Federal Employers' Liability Act.

STATUTE INVOLVED

This case arises under the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended by the Fair Labor Standards Amendments of 1949, c. 736, 63 Stat. 910, 29 U. S. C. 201 *et seq.*, the pertinent provisions of which are:

Definitions:

SEC. 3 [63 Stat. 911]. As used in this Act—

* * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

* * * * *

Maximum Hours:

SEC. 7 [63 Stat. 912]. (a) Except as otherwise provided in this section, no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * *

Investigations, Inspections, Records * * *

SEC. 11 [52 Stat. 1066]. * * * (c) Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Adminis-

trator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

STATEMENT

The Secretary of Labor brought this action pursuant to Section 17 of the Fair Labor Standards Act to enjoin respondent from violating the overtime and record-keeping requirements of that Act. The employees in question were employed in the performance of a half-a-million dollar contract awarded to respondent by the United States Corps of Engineers in connection with the construction of the Algiers Lock and Canal project in Orleans Parish, Louisiana.

The Algiers Lock and Canal is to form an integral part of an existing project known as the Gulf Intracoastal Waterway. It is designed to improve and make a faster, safer, and more dependable passage into, out of, and across the Mississippi River at New Orleans than is provided by the present Harvey Lock and Canal alone (district court opinion, App. 4a-5a). It was recommended by the Corps of Engineers (Sen. Doc. No. 188, 78th Cong., 2d. Sess.), and authorized by Congress under its power to regulate commerce (Rivers and Harbors Act of 1945, c. 19, 59 Stat. 10, 18) in the "interests of eliminating hazards and delays to existing and prospective commerce and for assuring the dependability of the waterway" (Sen. Doc. *supra*, p. 5).

The Gulf Intercoastal Waterway extends from Apalachee, Florida, to the Mexican border and is an instrumentality of commerce (district court opinion, App. 4a). Along the Gulf of Mexico the waterway crosses the Mississippi River at New Orleans. The main route of the waterway at this point now enters the Mississippi from the east through the Industrial Canal, extends upstream 5.5 miles through the harbor of New Orleans, and then leaves the river from the west through the Harvey Lock and Canal (Sen. Doc. *supra*, p. 3).

New Orleans is a major port for seagoing commerce and the main transshipment terminal for intracoastal barge traffic (Sen. Doc., *supra*, p. 3). In the 5.5 mile stretch of the waterway through this port intracoastal traffic has to compete with seagoing commerce for room to navigate (district court opinion, App. 4a). Moreover, intracoastal traffic itself "has greatly exceeded original expectations" (Sen. Doc. *supra*, p. 3) and Harvey Lock and Canal, built in 1934 (R. 41), is, as the district court found, "proving inadequate alone to handle" it (App. 4a). Since it is not practical to widen the Harvey Lock and Canal because it is located in a highly developed industrial section of the City of New Orleans (Sen. Doc. *supra*, p. 12, R. 40), Algiers Lock and Canal is being constructed to provide an alternate connection with the Mississippi at a point 4.7 miles downstream from the Industrial Canal (Sen. Doc., *supra*, p. 4).

The Algiers Lock and Canal will not only elimi-

nate the delays now encountered by intracoastal traffic using the congested Harvey Lock, but it will provide safer passage across the Mississippi. As the district court recognized, Algiers Point is "very dangerous and hazardous * * * and * * * has been the scene of many, many serious marine casualties" (R. 44). The Algiers Lock and Canal will avoid treacherous Algiers Point and the crowded port of New Orleans (district court opinion, App. 5a). Also, this alternate connection with the Mississippi will assure the dependability of the Intracoastal Waterway. As pointed out in the Senate Document covering this project, there is no closed navigation season on the lower Mississippi and the intracoastal waterway during which general overhaul and major repairs to locks may be accomplished without stopping traffic (Sen. Doc., *supra*, pp. 11-12, 13). Any accident or mishap necessitating the closure of Harvey Lock would interrupt the heavy volume of waterborne commerce using it since only a minor portion of this traffic could be diverted through the smaller alternate west bank connection at Plaquemine, 110 miles upstream from Harvey Lock (*id.* pp. 3, 11-12).

As described in the pertinent Senate Document, the Algiers Lock and Canal project involves the construction of a channel 12 feet deep and 125 feet wide, extending from the right bank of the Mississippi River, at a point 4.7 miles below the Industrial Canal, southwesterly a distance of 9 miles to the Intracoastal Waterway about six miles south

of Harvey Lock; a lock at the river end, 75 feet wide, 760 feet long and 13 feet deep, with an emergency storage dam; widened forebays at the lock; drainage canals east of the waterway to intercept existing drainage facilities; two pumping plants, two movable highway bridges and a movable railroad bridge across the waterway; a road relocation requiring two fixed bridges over existing canals, and other minor adjustments in local improvements.

Respondent's contract was for the "Earthwork and Emergency Dam Storage," described by its president as "build[ing] guide levees on the Mississippi River on the east end, and backfill[ing] the lock" (R. 51; district court opinion, App. 3a). At the time this work was undertaken by respondent, only the concrete work on the locks had been completed (R. 51). The project was still incomplete at the time of trial. Among other things, the earthwork levee which respondent built from the lock structure to the Mississippi levees in Algiers had not been tied in with those levees (R. 49). The canal itself had not been completely dredged (*id.*). Guide levees to the canal still had to be completed and the Mississippi River levees brought up to grade (R. 48-49). Of course, until the project is completed, it cannot be used as a part of the Gulf Intracoastal Waterway (R. 49). But work is continuing on it, and the Corps of Engineers contemplates that the project will be completed at the end of December, 1954 (R. 50).

Although the trial court found that the primary purpose of Algiers Lock and Canal is to relieve "the congestion which now obtains in Harvey Lock and Canal [and, in addition] * * * eliminate the necessity of Gulf Intracoastal Waterway traffic navigating the 5.5 miles of the Mississippi River through the crowded harbor of New Orleans and around treacherous Algiers Point" (App. 5a), it held that the work falls within the "new construction" doctrine of the early decisions under the Federal Employers' Liability Act, rather than the principles of *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, and *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 318 U.S. 740, 324 U.S. 720, and that respondent's employees could not, therefore, be said to be "engaged in commerce" within the meaning of the Fair Labor Standards Act. The Court of Appeals affirmed in a short *per curiam* opinion (App. 1a), which simply expressed agreement with the district judge's opinion, and cited two of its own recent decisions: *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (involving work on a highway construction project) and *Billeaudeau* v. *Temple Associates, Inc.*, 213 F. 2d 707 (involving work in connection with construction of a housing project).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed not only because it conflicts with decisions of several other courts of appeals and departs from principles enunciated by this Court, but also because of

its far-reaching importance in the interpretation and enforcement of the Fair Labor Standards Act. The decision, in its application of the "new construction" doctrine to an interstate waterway project, reflects the more general problems and confusion resulting from the application of that doctrine by a number of other lower federal courts in interstate highway construction cases. The question presented is thus not only of importance to the thousands of employees engaged in similar waterway projects throughout the country, but also to the thousands of employees engaged in interstate highway construction projects.

1. The decision below is in direct conflict with the Tenth Circuit's decision in *Tobin* v. *Pennington-Winter Construction Co.*, 198 F. 2d 334, certiorari denied, 345 U.S. 915; and is also, we believe, inconsistent with the Sixth Circuit's decision in *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, and with the Ninth Circuit's decision in *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334. In all of these cases, employees working on interstate waterway improvement projects were held to be "engaged in commerce" within the coverage of this Act, despite claims that the work was "new construction."

The *Pennington-Winter* decision, we believe, is indistinguishable from the instant case; indeed, the factual situation in the instant case affords an even stronger basis for coverage. The work held covered in *Pennington-Winter* was that of clearing the

reservoir site for a proposed new dam designed as part of a comprehensive plan for the improvement of the Arkansas and Mississippi Rivers. There, as here, the project had been authorized by Congress under its power to regulate commerce. As in the instant case, the work was not physically in the river bed or waterway to be improved, and the improvement to navigation would not be accomplished until the proposed project was completed. The dam and reservoir project in the *Pennington-Winter* case was less closely related to commerce, both in physical location and in practical effect upon the existing navigable channel, than is the lock and canal project involved in the instant case. The *Pennington-Winter* dam was to be located on a non-navigable tributary of the Arkansas River some 13 miles upstream from the confluence of the rivers whose navigability was to be improved by the dam, and its beneficial effect upon navigability depended largely upon the construction of a number of other similar tributary projects proposed in a comprehensive plan to be carried out over a period of years. In this respect, the instant case seems to present a stronger basis for coverage, since here the lock and canal is to be physically connected, at both ends, with the existing Gulf Intracoastal Waterway and is to be an integrated link in the navigable waterway itself. Moreover, in *Pennington-Winter* the dam was designed to serve various purposes (electric power, flood control, recreation) in addition to improving the navigability

of the affected waters. Here, the sole function of the project is improvement of the artery of commerce.

The trial court in *Pennington-Winter*, like the trial court here, had held that "New construction of an instrumentality of interstate commerce is not covered by the Fair Labor Standards Act" (see 10 WH Cases 506; 20 Labor Cases Par. 66705 (E.D. Okla., 1951) (not otherwise reported). But the Tenth Circuit, pointing to the fact that the multiple-purpose dam there in issue was part of a comprehensive plan for the improvement of existing waterways, reversed on the ground that the construction, though "new," was "no more than an improvement of an existing project for the control of floods and the betterment of navigation" (198 F. 2d at 336). "The construction of a new levee or a new dam is not to be considered as a separate construction," said the court (*id.* at 337). "They are no more than an addition to, or an improvement of, an existing instrumentality of interstate commerce" (*ibid.*).

The main reason given by the trial court in the instant case for not following *Pennington-Winter* and the decisions discussed *infra* (pp. 13-14) is that the project here involves "new construction" and is not physically located "in the [interstate] instrumentality itself" (App. 6a-7a, 10a). But, even assuming these factors to be significant, plainly the dam in *Pennington-Winter* was no less "new construction" than the work here, and, contrary to

the apparent assumption of the trial court below, the work there was that of clearing land for a reservoir, and was not physically in the existing interstate instrumentality it was designed to improve. The fact which the Tenth Circuit deemed significant and controlling in *Pennington-Winter* was that the project was "no more than an addition to, or an improvement of, an existing instrumentality of interstate commerce" (198 F. 2d at 337), regardless of whether it was new and regardless of whether it was physically located in the existing navigable channel.

The trial court in the instant case also relied (see App. 6a, 8a-9a) upon a ruling of the Wage and Hour Division and upon the decision of the Fifth Circuit in *Reed* v. *Murphey*, 168 F. 2d 257, which hold that employees engaged in the construction of a new building or structure to be dedicated, when completed, to the production of goods for commerce are not, during the period of construction, so closely related to commerce as to bring them within the coverage of the Act. But, as the Tenth Circuit said in *Pennington-Winter*, where it considered the *Reed* decision and others like it: "* * * this is not new construction in the sense that a new building for the manufacture of goods for commerce is new construction. Such a building by its mere construction is no part of commerce and has without more no active connection or relation thereto. It does not follow from the mere construction of such a building that it ever will have connection with

commerce or be dedicated to the production of goods for commerce. It could, after its construction, be dedicated solely for intrastate commerce, if its owners deem such use advisable." 198 F. 2d at 336.[1]

The decision below also conflicts in principle with the Sixth Circuit's decision in *Walling* v. *Patton-Tulley Transp. Co.*, 134 F. 2d 945, and with the Ninth Circuit's ruling in *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 156 F. 2d 334, although the factual situations in those cases are not so strikingly similar as in the *Pennington-Winter* case. In the *Patton-Tulley* case, the Sixth Circuit held the Act applicable to employees engaged in the construction of new dikes and revetments on the Mississippi River. There, as here, the purpose of the work was to improve a navigable waterway. Also there, as here, the trial court had denied coverage on the basis of the "new construction" doctrine of the early Federal Employers' Liability Act cases. The Sixth Circuit, in reversing, re-

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[1] The court of appeals here, apart from its reliance upon the trial court's opinion, cited two decisions of its own, *Billeaudeau* v. *Temple Associates, Inc.*, 213 F. 2d 707, and *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510. In *Billeaudeau*, however, the construction work was in connection with a local housing project, which was plainly not an instrumentality of commerce. The *Van Klaveren* decision held the Act inapplicable to a watchman employed in connection with the construction of a new highway project. We agree that the problems presented by highway construction projects are frequently analagous to those involved in waterway projects (see discussion *infra*, pp. 16-19, 22), though in the former class of cases the issues are not always so clearcut.

jected the "new construction" argument, stating that "the short answer is that the Mississippi River has been a highway of interstate commerce since states were first carved out of its contributory territory" (134 F. 2d at 947). In the *Puget Sound* case, the Act was held applicable to employees engaged in dredging new channels and constructing a new pier with retaining walls at Bremerton Harbor on the ground that the work extended the previously navigable portion of the harbor.

2. The decision below, in approach and in result, seems plainly inconsistent with the basic principles established by this Court's decisions construing the coverage of the Fair Labor Standards Act. Since the issue involved has far-reaching implications not only in the large area of employment on waterway construction projects but also in the equally important area of highway construction, review by this Court is of particular importance.

Instead of looking at the context of the "in commerce" language in this Act and the principles which this Court has held should guide its construction, the decision below simply assumed that the test of coverage was the "new construction" doctrine derived from several early decisions under the original Federal Employers' Liability Act. This Court has repeatedly admonished against applying any mechanical test or "touchstone" in determining the coverage of the Fair Labor Standards Act, as well as against "too narrow a construction of the Act." See *Kirschbaum* v. *Walling*, 316 U. S. 517, 520-521; *Walling* v. *Jacksonville Paper*

Co., 317 U.S. 564, 567; *Powell* v. *U. S. Cartridge Co.*, 339 U.S. 497, 516-517. The decisions have specifically pointed out that "The use of the words 'in commerce' entails an analysis" of the particular transactions and operations involved (*Jacksonville Paper*, at 571), and have emphasized the need to be guided by "practical considerations," such as the actual integral relationship of the employees' work to the interstate commerce, and the "national" as distinguished from "purely local" character of the work. *Kirschbaum* v. *Walling*, *supra*; *Overstreet* v. *North Shore Corp.*, 318 U.S. 125, 128. While noting that Congress did not exert its full constitutional power in this Act, this Court at the same time has reiterated that "it is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce" (*Walling* v. *Jacksonville Paper Co.*, *id.* at 567; *Overstreet* v. *North Shore Corp.*, *id.* at 128), and that "the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase 'engaged in commerce'" (*Overstreet* at 128).

We submit that the narrow "new construction" doctrine, derived from decisions rendered over 37 years ago under the old Federal Employers' Liability Act, is not the touchstone for determining the "in commerce" coverage of the Fair Labor Standards Act. This artificial test certainly does not afford an adequate means of determining whether construction work on interstate instru-

mentalities of commerce is "so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it'" (*Overstreet* decision at 130). When rigidly applied, it has inevitably led to incongruous results inconsonant with the broad purpose and design of the Act and with the "national" concept of commerce which it embraces. As a practical matter, it seems evident that "new construction" improving or expanding an instrumentality of interstate commerce is apt to have more substantial impact upon that commerce and no less intimate relation to it than ordinary repair and maintenance activities. Various courts of appeals have recognized this in dealing with interstate waterway improvement projects (see decisions cited, *supra*, pp. 9-14), although a different view has been taken by some of the same courts in cases involving interstate highway construction.[2] The decision below would extend the dubious reasoning of the latter cases to another large area of employment.

The direct and substantial relationship of waterway and highway improvement projects to inter-

[2] Several courts of appeals have ruled in recent years that the act is inapplicable to "new construction" of roads to be later connected with the interstate highway system. *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (C.A. 5); *Moss* v. *Gilliez Const. Co.*, 206 F. 2d 819 (C.A. 10); *Koepfle* v. *Garavaglia*, 200 F. 2d 191 (C.A. 6). Compare, however, *Walling* v. *McCready Construction Co.*, 156 F. 2d 932 (C.A. 3), certiorari denied, 329 U.S. 785. The three first-mentioned cases involved suits instituted by employees, and the Department of Labor appeared only as *amicus curiae*. The Government was not in a position to seek Supreme Court review, and the unsuccessful employees did not do so.

state commerce seems indisputable. Plainly there is nothing peculiarly "local" about such projects; they are not "historic functions of the individual states" which practical considerations would place beyond the broad scope of commerce contemplated by the Act. See *Kirschbaum* decision at 520-521, 523. Indeed, so far as the development of navigable waters is concerned, the matter is exclusively within the federal domain; Congress's "power over improvements for navigation in rivers is 'absolute' ", *United States* v. *Appalachian Power Co.*, 311 U. S. 377, 405. And see *Gibbons* v. *Ogden*, 9 Wheat. 1, 23; *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508.[3] This Court has also declared that "roads" (as well as railroads) "are in law and in fact integrated and indispensable parts of our system of commerce among the states." *Alstate Construction Co.* v. *Durkin*, 345 U.S. 13, 16. The peculiarly national character of both road and waterway construction is also significantly evidenced by the fact that they have long been financed wholly or in large part by federal funds.

Labeling a waterway or highway improvement project "new" casts little if any light on the standards which this Court's decisions have prescribed for determining whether work is within the "in commerce" coverage of the Act. And nothing in this Court's decisions implies that construction

[3] In the *Oklahoma* case, this Court, considering Congress's powers under the commerce clause, rejected the idea of "viewing each reservoir project in isolation from a comprehensive plan" covering the entire river system. 313 U.S. at 525.

work, whose unquestioned use and purpose is to improve or assure the efficient and proper functioning of an interstate channel, is excluded from the Act merely because it is "new." While the work in the *Overstreet* case, *supra*, was maintenance and repair work, the *ratio decidendi* was that the work was "vital to the proper functioning of * * * instrumentalities of interstate commerce" and that it provided "a means of interstate transportation and communication * * * so intimately related to interstate commerce 'as to be in practice and in legal contemplation a part of it.' " 318 U.S. at 128, 130. That the principle does not exclude "new" construction is evidenced by the fact that the construction work held covered in the closely related case of *Pedersen* v. *J. F. Fitzgerald Construction Co.*, 318 U.S. 740, 742; 324 U.S. 720, involved "entirely new" bridge abutments which had not been completed during the period of employment involved (324 U.S. at 724).[4]

Although the "new construction" doctrine was not explicitly considered in the recent cases of *Allstate Construction Co.* v. *Durkin*, 345 U.S. 13, and *Thomas* v. *Hempt Bros.*, 345 U.S. 19, the holding there—that employees engaged in the manufacture of road materials were producing goods for commerce—apparently drew no distinction between an end use in road maintenance work and

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[4] In *Pedersen*, the "new construction" argument was vigorously pressed by the employer. See brief in opposition in No. 396, Oct. Term 1942, pp. 5, 10.

utilization in "new construction." Thus, the opinion in the *Hempt* case noted that the complaint alleged that the materials were being produced for "laying and building" the Pennsylvania Turnpike and "to build and erect landing fields" at an airport, as well as for repair and maintenance of road beds. 345 U.S. at 20. It was the close relationship to interstate instrumentalities of commerce which was, without more, controlling.[5]

In applying the Federal Employers' Liability Act cases to the coverage question, the decision below seems to have ignored this Court's recognition in the *Overstreet* decision that the two Acts, though similar in some respects, "are not strictly analogous" (318 U.S. at 131), and its caution (in *McLeod* v. *Threlkeld*, 319 U.S. 491, 495) that "There is no single concept of interstate commerce which can be applied to every federal statute regulating commerce" and that "The effect of the over-refinement

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[5] See the decision of the Third Circuit in *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932, certiorari denied, 329 U.S. 785, and of the Fourth Circuit in *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286. In the latter case, the Fourth Circuit, after meticulously analyzing this Court's decisions in the *Overstreet, Pedersen, and Jacksonville Paper* cases, *supra*, as well as the decisions under the Federal Employers' Liability Act, rejected the contention that the construction of a new highway bridge was outside the scope of the Act under the "new construction" doctrine, stating (167 F. 2d at 288): "If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; not broken down into its various phases so as to defeat the purpose of the Act. This latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564 • • •."

of factual situations which hampered the application of the Federal Employers' Liability Act, prior to the recent amendment, we hope is not to be repeated in the administration and operation of the Fair Labor Standards Act." See also *Walling* v. *McCrady Construction Co.*, 156 F. 2d 932, 936 (C.A. 3), certiorari denied, 329 U.S. 785.

The earlier statute was, of course, restricted to the interstate transportation operations of railroads. Indeed, it was then the prevailing view that the power of Congress to regulate the incidents of employment was confined to employees engaged in "transportation" (see *Employers' Liability Cases*, 207 U.S. 463; *Raymond* v. *Chicago, M. & St. P. Ry.*, 243 U.S. 43; *New York, N. H. & H. R. Co.* v. *Bezue*, 284 U.S. 415)—a view which produced many of the over-refinements (including the "new construction" doctrine) which characterized the early interpretations of the Act. For example, the statute was narrowly construed as not applying to back-shop employees engaged in making repairs on locomotives and cars. *Bezue* case, *supra*. Only later, and then under another statute (the Railway Labor Act), were these back-shop activities held to "have such a relation to the other confessedly interstate activities * * * that they are to be regarded as a part of them," *Virginian Railway* v. *System Federation*, 300 U.S. 515, 556.[6]

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[6] We do not, of course, refer to the *Virginian Railway* case to suggest that the standards of coverage under the Railway Labor Act and the Fair Labor Standards Act are identical, but in order to indicate the evolution of the "commerce" concept in the years following the early Employers' Liability cases.

The Fair Labor Standards Act was adopted after a more modern concept of "commerce" had emerged. Thus, in considering the scope of the "commerce" power, the legislators specifically referred to the holding in the *Virginian Railway* case, which had recently been decided by this Court.[7]

And in marked contrast to the Employers' Liability Act, which was limited to railroads, the Fair Labor Standards Act was designed for broad national purposes reaching into all industries engaged in interstate commerce. Its objective was not simply "to regulate interstate commerce as such," but "to eliminate, as rapidly as practicable, substandard labor conditions throughout the nation," *Powell* v. *U. S. Cartridge Co.*, 339 U.S. at 510. Its "scope was stated in terms of substantial universality" because "Breadth of coverage was vital to its mission," *id.* at 516.

Not surprisingly, the effort to import into the latter Act the doctrines of early Employers' Liability cases has produced anomalous results. The consequence has been to exclude from the Act's coverage work of the most "national" character and work most significantly and directely related to interstate navigation, such as the lock and canal project in the instant case, while including work on levees, dikes, revetments, reservoirs and dams.

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[7] Senator (now Mr. Justice) Minton, in the course of a colloquy with Senators Borah and Bailey on the intended scope of the Act's coverage, explicitly pointed out that the Supreme Court had held back-shop employees "to be in commerce." 83 Cong. Rec. 9172.

whose effects on navigation are less directly significant to the interstate traffic on the waterway. The same incongruities have occurred in the road construction cases. Thus, work on such nationally important projects as the Edsel Ford Expressway in Detroit and the San Antonio Expressway in Texas (*Koepfle* v. *Garavaglia*, 200 F. 2d 191 (C. A. 6); *Martinez* v. *Killian-House Co.*, 255 S. W. 2d 227 (Texas Civ. App.), followed in *Van Klaveren* v. *Killian-House Co.*, 210 F. 2d 510 (C.A. 5)), have been held to be less intimately related to interstate commerce than repair and maintenance work on ordinary city feeder streets whose connection with the interstate highway system is not nearly as direct or vital to interstate commerce as are the important expressways from large industrial centers.[8] The persistent conflict and confusion in the cases can only be corrected by review in this Court.

3. The general importance of the issue involved in the instant case is further evidenced by the hundreds of other navigation projects currently authorized and by the huge sums appropriated by Congress in 1953 and 1954 for navigation and flood con-

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[8] We recognize, of course, that in some instances road construction which bears an appreciable relationship to interstate traffic may also serve local traffic in equal or greater degree, and that there may be cases in which the substantiality of the interstate aspects presents a question of fact. Certainly, however, no such problem is involved in the instant waterway case since the only purpose served is that of a national artery of commerce.

trol.[9] Senate Report No. 2007, 83d Cong., 2d Sess., p. 3, states:

> * * * the total number of navigation projects or modifications now under way but not completed is 143 and the total cost is $1,409 million, of which $878 million has been appropriated through the fiscal year 1954. Navigation projects or modifications authorized but not yet started total 254 in number and have a total estimated cost of $911 million of which $5 million has been appropriated to date for planning purposes. The total active navigation program, therefore, amounts to 2,166 projects or modifications, having a total estimated cost of $3,176 million, of which $1,739 million is the cost to date. The foregoing figures exclude a few multiple-purpose projects which include other major functions in addition to navigation. Technically authorized but considered inactive or deferred for restudy are a number of navigation projects not included in the foregoing figure.
>
> These projects lie in all parts of the United States and its possessions and include 28,000 miles of improved waterways, about 500 locks

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[9] See Public Law 504, 82nd Cong., 2d Sess., 66 Stat. 579, Public Law 153, 83rd Cong., 1st Sess., 67 Stat. 197, and Public Law 453, 83rd Cong., 2d Sess., 68 Stat. 330, appropriating funds for river and harbor and flood control projects for the fiscal years ending June 30, 1953, June 30, 1954, and June 30, 1955, respectively.

and dams, and almost 300 commercial harbors.
* * *

For a list of these various projects, see Statement of the Managers on the Part of the House (Report No. 2497, 82d Congress, 2d Sess.).

The extent of road construction work is indicated by the hundreds of millions of dollars contributed to the States each year by the Federal Government for this purpose. Thus, during the 83rd Congress over a billion dollars was appropriated [10] to carry out authorized highway construction programs. Moreover, an addition road construction program was authorized by Public Law 350, 83rd Cong., 2d Sess., on the basis of $700 million for each of the fiscal years 1956 and 1957. Since contributions to the States are made on the basis that the States expend an amount equal to that contribution, the total expenditure is expected to be double these amounts.

It is thus apparent that the effect on the numerous workers employed on waterway projects alone is of sufficient importance to warrant review of the decision below. Insofar as additional thousands of employees engaged in comparable road construction may be also affected, the importance of this review is, of course, correspondingly increased.

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[10] Public Law 11, 83rd Cong., 1st Sess., 66 Stat. 464 ($198 m.); Public Law 59, 83rd Cong., 1st Sess., 67 Stat. 57 ($5 m.); Public Law 195, 83rd Cong., 1st Sess., 67 Stat. 367 ($499,250,000); Public Law 357, 83rd Cong., 2d Sess., 68 Stat. 81 ($55 m.); Public Law 471, 83rd Cong., 2d Sess., 68 Stat. 413 ($517 m.); Public Law 663, 83rd Cong., 2d Sess., 68 Stat. 800 ($18,250,000).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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